SUPREME COURT, U. S.
FILED
NOV 12
MICHAEL RODAK, JR.

in the

Supreme Court

of the

United States

OCTOBER TERM, 1974

No. 74-287

GABLES BY THE SEA, INC., a Florida corporation,
Petitioner,

vs.

EMMETT C. LEE, JR., ET AL.,
Respondents,

and

TROPICAL AUDUBON SOCIETY, INC., FLORIDA AUDUBON SOCIETY, INC., AND NATIONAL AUDUBON SOCIETY, INC.,
Respondents-Intervenors.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS-INTERVENORS IN OPPOSITION

PARKER D. THOMSON
SANFORD L. BOHRER
PAUL & THOMSON
Counsel for Respondents — Intervenors Tropical Audubon Society, Inc., Florida Audubon Society, Inc. and National Audubon Society, Inc.
1300 First National Bank Building
Miami, Florida 33131

S. FOWLER & CO., INC. — 325-7403 — 325-3351

INDEX

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTION PRESENTED	3
STATUTES AND REGULATIONS INVOLVED	3
STATEMENT	3
ARGUMENT	5
CONCLUSION	10

CITATIONS

STATUTES AND REGULATIONS

	Page
Environmental Protection Agency Regulations on State Certification of Activities Requiring a Federal License or Permit, 40 C.F.R. § 123.2	7
Federal Water Pollution Control Act Amendments of 1972, 86 Stat. 816, 33 U.S.C. § 1341, *et seq.*	2
Florida Administrative Code, Section 17-3.01	8, 9
Water Quality Improvement Act of 1970, 84 Stat. 91, 33 U.S.C. § 1161, *et seq.*	3, 5, 6

in the

Supreme Court

of the

United States

OCTOBER TERM, 1974

No. 74-287

GABLES BY THE SEA, INC., a Florida corporation,
Petitioner,

vs.

EMMETT C. LEE, JR., ET AL.,
Respondents,

and

TROPICAL AUDUBON SOCIETY, INC.,
FLORIDA AUDUBON SOCIETY, INC., AND
NATIONAL AUDUBON SOCIETY, INC.,
Respondents-Intervenors.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS-INTERVENORS IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the District Court is reported at 365 F. Supp. 826, and is set out on pages 4-7 of the appendix to the Petition of Certiorari.[1] The memo-

[1]The appendix to the Petition for Certiorari will be abbreviated "Pet.App." The appendix to this brief will be referred to as "App."

randum opinion of the Court of Appeals is reported at 498 F.2d 1340, and is set out at Pet. App. 1.

JURISDICTION

Jurisdiction of the Petition for Certiorari in this action is vested in this Court by 28 U.S.C. §1254 and Rule 19(b) of the Rules of this Court.

However, the sole position of Respondents-Intervenors (collectively referred to herein as "Audubon") asserted to the Court of Appeals below is that the District Court lacked jurisdiction because the action presents no justiciable question. Petitioner's complaint in this action contends that its right to due process was abridged by denial by the United States Army Corps of Engineers (the "Corps") of Petitioner's application for a dredge and fill permit. Audubon contends the Corps lacked jurisdiction to accept and consider Petitioner's permit application by reason of Petitioner's failure to comply with the condition precedent to such consideration imposed by the Water Quality Improvement Act of 1970 (the "Water Quality Act").[1] Therefore the manner of the Corps' review of the permit application and the manner of the judicial review of the Corps' denial of the permit application present no justiciable questions to this Court.

---

[1]84 Stat. 91, 33 U.S.C. §1161, *et seq.* The Water Quality Act was amended, reorganized and expanded by the Federal Water Pollution Control Act Amendments of 1972, Public Law 92-500, but the certification requirements remain equally stringent, and are now found at 86 Stat. 877, 33 U.S.C. §1341.

QUESTION PRESENTED

Whether a justiciable question is presented to this Court by judicial summary affirmance of a denial on the merits of an application for a dredge and fill permit by the United States Army Corps of Engineers, where the Corps lacked jurisdiction to accept and consider the permit application by reason of failure of the applicant to meet a statutory condition precedent to making such application.

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the Water Quality Improvement Act of 1970, 84 Stat. 91, 33 U.S.C. §1161, *et seq.* and the pertinent regulations thereunder (40 C.F.R. §123, *et seq.*) are set forth in the appendix to this brief.

STATEMENT

On July 28, 1972 Petitioner submitted a permit application to the Corps to dredge and fill a finger canal project in Biscayne Bay, Florida. The application provided for dredging in the Bay seaward of the mean high water line and creating artificial "fingers" seaward of the mean high water line by filling with the dredged material.

The Water Quality Act requires, as a condition precedent to making such application to the Corps, that the applicable state certifying agency (here the Florida Department of Pollution Control) have previously certified

to the Corps that the proposed dredging and filling "will be conducted in a manner which will not violate applicable water quality standards." No such certification was submitted. In a letter to Petitioner from the Florida Department of Pollution Control dated May 15, 1972 the Department stated it had "never received an application for certification" from Petitioner and consequently was unable to determine whether "the project will be conducted in a manner that will not violate applicable water quality standards." (App. 14).

On September 18, 1972 Audubon filed in the Corps' proceeding Objections to Permit and Request for Hearing contesting, *inter alia,* the jurisdiction of the Corps to pass on Petitioner's permit application because Petitioner had not satisfied the statutory precondition to making application. The Corps did not rule on and by considering and denying the permit application on its merits inferentially rejected Audubon's Objections.

Petitioner then sought review of the Corps' action in the District Court and the Court of Appeals and Audubon moved to intervene before each Court to assert the same jurisdictional defect. The Department of Justice, which defended the Corps' denial on the merits, was unwilling to assert the Corps' lack of jurisdiction to deny Petitioner's permit application on its merits. The District Court denied Audubon's motion to intervene, but the Court of Appeals granted intervention.

ARGUMENT

Rule 23(1)(g) of the Rules of this Court requires that:

> "If review of the judgment of a federal court is sought, the statement of the case shall also show the basis for federal jurisdiction in the court of first instance."

Petitioner has made and can make no such showing.

Under the Water Quality Act each application for a permit to dredge and fill in navigable waters must undergo a two-stage agency review process. Initially the proposed activity is examined by the "certifying agency" of the state wherein the activity will take place. The certifying agency reviews the application to determine whether it can certify that there is reasonable assurance that the proposed dredging and filling "will not violate applicable water quality standards". If the certifying agency can so certify it issues a certification to the applicant for submission to the federal agency (usually, as here, the Corps), which being assured applicable water quality standards are not violated, passes on the merits of the permit application. Where certification is denied or has not been obtained by the applicant, the Act states "no license or permit shall be granted [by the federal agency]." 84 Stat. 108, 33 U.S.C. §1171(b)(1). (App. 2). See also 86 Stat. 878, 33 U.S.C. §1341(a)(1).

The permit application submitted by Petitioner to the Corps was defective on its face because it showed Petitioner had failed even to seek, much less obtain, certifica-

tion from the state certifying agency. In a letter to Petitioner dated May 15, 1972 the state certifying agency in this case, the Florida Department of Pollution Control informed Petitioner:

> ". . . the Department of Pollution Control has never received an application for certification on this project from Gables-by-the-Sea, Inc., has not reviewed and analyzed the project, *and consequently, does not, in fact, know whether or not there is reasonable assurance that the project will be conducted in a manner that will not violate applicable water quality standards of the State of Florida.*" (Emphasis added) (App. 14).

The Water Quality Act precludes consideration of a permit application by the Corps. until the applicant:

> ". . . shall provide the licensing or permitting agency [here the Corps] a certification from the State . . . that *there is reasonable assurance,* as determined by the State . . . *that such activity will be conducted in a manner which will not violate applicable water quality standards. . . .*" 84 Stat. 108, 33 U.S.C. 1171(b)(1) (App. 1).

and provides further that

> "No license or permit shall be granted until the certification required by this section has been obtained or has been waived [under circumstances not applicable here] . . ." 84 Stat. 108, 33 U.S.C. §1171(b)(1) (App. 2).

The Environmental Protection Agency Regulations on "State Certification of Activities Requiring a Federal License or Permit", 40 C.F.R. §123.2 (adopted November 25, 1971 and redesignated October 11, 1972), require:

> "(a) A certification made by a certifying agency shall include the following:
>
> * * *
>
> (2) A statement that the certifying agency has either (i) examined the application made by the applicant to the licensing or permitting agency . . . and bases its certification upon an evaluation of the information contained in such application which is relevant to water quality considerations, or (ii) examined other information furnished by the applicant sufficient to permit the certifying agency to make the statement described in subparagraph (3) of this paragraph;
>
> (3) *A statement that there is a reasonable assurance that the activity will be conducted in a manner which will not violate applicable water quality standards; . . .*" (Emphasis added) (App. 8, 9).

§123.1 of the Regulations defines "certifying agency" as

> ". . . the person or agency designated by the Governor of a State, by statute, or by other governmental act, to certify compliance with applicable water quality standards." (App. 8).

The certifying agency in Florida is the Department of Pollution Control. The "applicable water quality standards", established pursuant to 89 Stat. 907, 33 U.S.C. §1160(c),[1] are set forth in the Rules of the Department of Pollution Control, Pollution of Waters, Chapter 17-3 Florida Administrative Code.

The "certification" submitted by Petitioner shows on its face that the Florida Department of Pollution Control never received an application from Petitioner for certification, much less made the statutorily required administrative review and issued certification based on such review. Instead, the only "certification" was "issued" by the Circuit Court of Florida, Second Judicial Circuit, pursuant to mandate of the District Court of Appeal of Florida, First District, which ordered the Department of Pollution Control to apply pen to paper to issue a "certification" never even applied for. The "certification" states:

> ". . . it should be noted that the Department of Pollution Control has never received an application for certification on this project from Gables-by-the-Sea, Inc., has not reviewed and analyzed the project, *and consequently, does not, in fact, know whether or not there is reasonable assurance that the project will be conducted in a*

[1]This section was added by Public Law 89-234, §5(a) to the Federal Water Pollution Control Act of 1948 which was amended, reorganized, and expanded by Public Law 92-500, the Federal Water Pollution Control Act Amendments of 1972, and its requirements, which remain substantively identical, are now covered for this type of action by 86 Stat. 844, 33 U.S.C. §1313. The Administrator of EPA has determined that Florida's standards meet the criteria of 33 U.S.C. 1160(c). 40 C.F.R. §120.10.

> *manner that will not violate applicable water quality standards of the State of Florida."* (Emphasis added) (App. 14).

In addition to its failure to comply with federal law, issuance of this piece of paper was in direct conflict with the Department of Pollution Control's own rules:

> "The [Florida Pollution Control] Board recognizes and will protect the interest of the Federal Government in interstate and coastal waters in accordance with the Federal Water Pollution Control Act, as amended." Section 17-3.01, Florida Administrative Code.

There being no certification in compliance with the 1970 Water Quality Act and other Federal Acts and Regulations, the Corps lacked jurisdiction to even consider Petitioner's application.

CONCLUSION

For the foregoing reasons it is respectfully submitted this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

/s/ Parker D. Thomson

Parker D. Thomson
Sanford L. Bohrer
Paul & Thomson
Counsel for Respondents — Intervenors Tropical Audubon Society, Inc., Florida Audubon Society, Inc. and National Audubon Society, Inc.
1300 First National Bank Building
Miami, Florida 33131
(305) 371-5461

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Brief of Respondents-Intervenors in Opposition was served upon the following by mail this 12th day of November, 1974:

Mr. Robert H. Bork
Solicitor General
Department of Justice
Washington, D. C. 20530

Messrs. Marion E. Sibley
Allan M. Glaser
P. O. Box 390360
Miami Beach, Florida 33139

/s/ Parker D. Thomson

APPENDIX TO BRIEF OF RESPONDENTS-INTERVENORS TROPICAL AUDUBON SOCIETY, INC., FLORIDA AUDUBON SOCIETY, INC., AND NATIONAL AUDUBON SOCIETY, INC.

WATER QUALITY IMPROVEMENT ACT OF 1970

84 Stat. 108, 33 U.S.C. § 1171

(b) (1) Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters of the United States, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable waters at the point where the discharge originates or will originate, that there is reasonable assurance, as determined by the State or interstate agency that such activity will be conducted in a manner which will not violate applicable water quality standards. Such State or interstate agency shall establish procedures for public notice in the case of all applications for certification by it, and to the extent it deems appropriate, procedures for public hearings in connection with specific applications. In any case where such standards have been promulgated by the Secretary pursuant to section 1160(c) of this title, or where a State or interstate agency has no

authority to give such a certification, such certification shall be from the Secretary. If the State, interstate agency, or Secretary, as the case may be, fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application. No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence. No license or permit shall be granted if certification has been denied by the State, interstate agency, or the Secretary, as the case may be.

(2) Upon receipt of such application and certification the licensing or permitting agency shall immediately notify the Secretary of such application and certification. Whenever such a discharge may affect, as determined by the Secretary, the quality of the waters of any other State, the Secretary within thirty days of the date of notice of application for such Federal license or permit shall so notify such other State, the licensing or permitting agency, and the applicant. If, within sixty days after receipt of such notification, such other State determines that such discharge will affect the quality of its waters so as to violate its water quality standards, and within such sixty-day period notifies the Secretary and the licensing or permitting agency in writing of its objection to the issuance of such license or permit and requests a public hearing on such objection, the licensing or permitting agency shall hold such a hearing. The Secretary shall at such hearing submit his evaluation and recommendations with respect to any such objection to the licensing or

permitting agency. Such agency, based upon the recommendations of such State, the Secretary, and upon any additional evidence, if any, presented to the agency at the hearing, shall condition such license or permit in such manner as may be necessary to insure compliance with applicable water quality standards. If the imposition of conditions cannot insure such compliance such agency shall not issue such license or permit.

(3) The certification obtained pursuant to paragraph (1) of this subsection with respect to the construction of any facility shall fulfill the requirements of this subsection with respect to certification in connection with any other Federal license or permit required for the operation of such facility unless, after notice to the certifying State, agency, or Secretary, as the case may be, which shall be given by the Federal agency to whom application is made for such operating license or permit, the State, or if appropriate, the interstate agency or the Secretary, notifies such agency within sixty days after receipt of such notice that there is no longer reasonable assurance that there will be compliance with applicable water quality standards because of changes since the construction license or permit certification was issued in (A) the construction or operation of the facility, (B) the characteristics of the waters into which such discharge is made, or (C) the water quality standards applicable to such waters. This paragraph shall be inapplicable in any case where the applicant for such operating license or permit has failed to provide the certifying State, or if appropriate, the interstate agency or the Secretary, with notice of any proposed changes in the construction or operation of the facility with respect to which a construction license or permit has

been granted which changes may result in violation of applicable water quality standards.

(4) Prior to the initial operation of any federally licensed or permitted facility or activity which may result in any discharge into the navigable waters of the United States and with respect to which a certification has been obtained pursuant to paragraph (1) of this subsection, which facility or activity is not subject to a Federal operating license or permit, the licensee or permittee shall provide an opportunity for such certifying State or, if appropriate, the interstate agency or the Secretary to review the manner in which the facility or activity shall be operated or conducted for the purposes of assuring that applicable water quality standards will not be violated. Upon notification by the certifying State or, if appropriate, the interstate agency or the Secretary that the operation of any such federally licensed or permitted facility or activity will violate applicable water quality standards, such Federal agency may, after public hearing, suspend such license or permit. If such license or permit is suspended, it shall remain suspended until notification is received from the certifying State, agency, or Secretary, as the case may be, that there is reasonable assurance that such facility or activity will not violate applicable water quality standards.

(5) Any Federal license or permit with respect to which a certification has been obtained under paragraph (1) of this subsection may be suspended or revoked by the Federal agency issuing such license or permit upon the entering of a judgment under section 1160(h) of this

title that such facility or activity has been operated in violation of applicable water quality standards.

(6) No Federal agency shall be deemed to be an applicant for the purposes of this subsection.

(7) In any case where actual construction of a facility has been lawfully commenced prior to April 3, 1970, no certification shall be required under this subsection for a license or permit issued after April 3, 1970, to operate such facility, except that any such license or permit issued without certification shall terminate at the end of the three-year period beginning on April 3, 1970, unless prior to such termination date the person having such license or permit submits to the Federal agency which issued such license or permit a certification and otherwise meets the requirements of this subsection.

(8) Except as provided in paragraph (7), any application for a license or permit (A) that is pending on April 3, 1970, and (B) that is issued within one year following April 3, 1970, shall not require certification pursuant to this subsection for one year following the issuance of such license or permit, except that any such license or permit issued shall terminate at the end of one year unless prior to that time the licensee or permittee submits to the Federal agency that issued such license or permit a certification and otherwise meets the requirements of this subsection.

(9) (A) In the case of any activity which will affect water quality but for which there are no applicable water quality standards, no certification shall be required under

this subsection, except that the licensing or permitting agency shall impose, as a condition of any license or permit, a requirement that the licensee or permittee shall comply with the purposes of this chapter.

(B) Upon notice from the State in which the discharge originates or, as appropriate, the interstate agency or the Secretary, that such licensee or permittee has been notified of the adoption of water quality standards applicable to such activity and has failed, after reasonable notice, of not less than six months, to comply with such standards, the license or permit shall be suspended until notification is received from such State or interstate agency or the Secretary that there is reasonable assurance that such activity will comply with applicable water quality standards.

ENVIRONMENTAL PROTECTION AGENCY REGULATIONS ON STATE CERTIFICATION OF ACTIVITIES REQUIRING A FEDERAL LICENSE OR PERMIT

(Adopted 36 FR 22387, November 25, 1971, redesignated 37 FR 21441, October 11, 1972)

PART 123 — STATE CERTIFICATION OF ACTIVITIES REQUIRING A FEDERAL LICENSE OR PERMIT

Subpart A — General

§ 123.1 Definitions.

As used in this part, the following terms shall have the meanings indicated below:

(a) "License or permit" means any license or permit granted by an agency of the Federal Government to conduct any activity which may result in any discharge into the navigable waters of the United States.

(b) "Licensing or permitting agency" means any agency of the Federal Government to which application is made for a license or permit.

(c) "Administrator" means the Administrator, Environmental Protection Agency.

(d) "Regional Administrator" means the Regional designee appointed by the Administrator, Environmental Protection Agency.

(e) "Certifying Agency" means the person or agency designated by the Governor of a State, by statute, or by other governmental act, to certify compliance with applicable water quality standards. If an interstate agency has sole authority to so certify for the area within its jurisdiction, such interstate agency shall be the certifying agency. Where a State agency and an interstate agency have concurrent authority to certify, the State agency shall be the certifying agency. Where water quality standards have been promulgated by the Administrator pursuant to section 10 (c) (2) of the Act or where no State or interstate agency has authority to certify, the Administrator shall be the certifying agency.

(f) "Act" means the Federal Water Pollution Control Act, 33 U.S.C. 1151, et seq.

(g) "Water Quality Standards" means standards established pursuant to section 10 (c) of the Act, and State-adopted water quality standards for navigable waters which are not interstate waters.

§ 123.2 Contents of certification.

(a) A certification made by a certifying agency shall include the following:

(1) The name and address of the applicant;

(2) A statement that the certifying agency has either (i) examined the application made by the applicant to the licensing or permitting agency (specifically identifying the number or code affixed to such application) and

bases its certification upon an evaluation of the information contained in such application which is relevant to water quality considerations, or (ii) examined other information furnished by the applicant sufficient to permit the certifying agency to make the statement described in subparagraph (3) of this paragraph;

(3) A statement that there is a reasonable assurance that the activity will be conducted in a manner which will not violate applicable water quality standards;

(4) A statement of any conditions which the certifying agency deems necessary or desirable with respect to the discharge or the activity; and

(5) Such other information as the certifying agency may determine to be appropriate.

(b) The certifying agency may modify the certification in such manner as may be agreed upon by the certifying agency, the licensing or permitting agency, and the Regional Administrator.

§ 123.3 Contents of application.

A licensing or permitting agency shall require an applicant for a license or permit to include in the form of application such information relating to water quality considerations as may be agreed upon by the licensing or permitting agency and the Administrator.

Subpart B — Determination of Effect on Other States

§ 123.11 Copies of documents.

(a) Upon receipt from an applicant of an application for a license or permit without an accompanying certification, the licensing or permitting agency shall either (1) forward one copy of the application to the appropriate certifying agency and two copies to the Regional Administrator, or (2) forward three copies of the application to the Regional Administrator, pursuant to an agreement between the licensing or permitting agency and the Administrator that the Regional Administrator will transmit a copy of the application to the appropriate certifying agency. Upon subsequent receipt from an applicant of a certification, the licensing or permitting agency shall forward a copy of such certification to the Regional Administrator, unless such certification shall have been made by the Regional Administrator pursuant to § 115.24.

(b) Upon receipt from an applicant of an application for a license or permit with an accompanying certification, the licensing or permitting agency shall forward two copies of the application and certification to the Regional Administrator.

(c) Only those portions of the application which relate to water quality considerations shall be forwarded to the Regional Administrator.

§ 123.12 Supplemental information.

If the documents forwarded to the Regional Adminis-

trator by the licensing or permitting agency pursuant to § 115.11 do not contain sufficient information for the Regional Administrator to make the determination provided for in § 115.13, the Regional Administrator may request, and the licensing or permitting agency shall obtain from the applicant and forward to the Regional Administrator, any supplemental information as may be required to make such determination.

§ 123.13 Review by Regional Administrator and notification.

The Regional Administrator shall review the application, certification, and any supplemental information provided in accordance with §§ 115.11 and 115.12 and if the Regional Administrator determines there is reason to believe that a discharge may affect the quality of the waters of any State or States other than the State in which the discharge originates, the Regional Administrator shall, no later than 30 days of the date of receipt of the application and certification from the licensing or permitting agency as provided in § 115.11, so notify each affected State, the licensing or permitting agency, and the applicant.

§ 123.14 Forwarding to affected State.

The Regional Administrator shall forward to each affected State a copy of the material provided in accordance with § 115.11.

§ 123.15 Hearings on objection of affected State.

When a licensing or permitting agency holds a public hearing on the objection of an affected State, notice of

such objection, including the grounds for such objection, shall be forwarded to the Regional Administrator by the licensing or permitting agency no later than 30 days prior to such hearing. The Regional Administrator shall at such hearing submit his evaluation with respect to such objection and his recommendations as to whether and under what conditions the license or permit should be issued.

§ 123.16 Waiver.

The certification requirement with respect to an application for a license or permit shall be waived upon:

(a) Written notification from the State or interstate agency concerned that it expressly waives its authority to act on a request for certification; or

(b) Written notification from the licensing or permitting agency to the Regional Administrator of the failure of the State or interstate agency concerned to act on such request for certification within a reasonable period of time after receipt of such request, as determined by the licensing or permitting agency (which period shall generally be considered to be 6 months, but in any event shall not exceed 1 year).

In the event of a waiver hereunder the Regional Administrator shall consider such waiver as a substitute for a certification, and as appropriate, shall conduct the review, provide the notices, and perform the other functions identified in sections 115.13, 115.14, and 115.15. The notices required by section 115.13 shall be provided not later than 30 days after the date of receipt by the Regional Administrator of either notification referred to herein.

App. 13

STATE OF FLORIDA
DEPARTMENT OF POLLUTION CONTROL
Suite 300, Tallahassee Bank Building
315 South Calhoun Street, Tallahassee, Florida 32301

May 15, 1972

Dade County

Dredge & Fill Certificate
Corps of Engineers Permit No. 56188
Trustees Deed No. 21645 (253.124)

Received May 18 1972

Gables By the Sea, Inc.,
c/o Marion E. Sibley, Esquire
Sibley, Giblin, Levenson & Ward
605 Lincoln Road
Miami, Beach, Florida 33139

Subject: State certification in accordance with §21(b) Public Law 91-224

Gentlemen:

In accordance with the attached order of the Circuit Court of the Second Judicial Circuit, Leon County, Florida, the Department of Pollution Control issues its certification of the dredge and fill project proposed by Gables By the Sea, Inc. in South Biscayne Bay, Dade County, Florida, as outlined in the above noted documents.

However, it should be noted that the Department of Pollution Control has never received an application for certification on this project from Gables By the Sea, Inc., has not reviewed and analyzed the project, and consequently, does not, in fact, know whether or not there is reasonable assurance that the project will be conducted in a manner that will not violate applicable water quality standards of the State of Florida.

The applicant is cautioned that during the execution and/or maintenance of the subject project, addition of turbidity in excess of fifty (50) Jackson units as determined by the standard candle turbidimeter, above the background level and/or the direct or indirect effecting of the water quality in the aforementioned waterway in such a manner as to exceed the limitation of the concentrations of various constituents for such waters, as prescribed in Chapter 17-3, Florida Administrative Code, are violations of the water quality standards of the State of Florida. The applicant is hereby required to notify this agency of the schedule of the project.

Yours very truly,

/s/ W. E. Linne,

W. E. Linne, Chief
Bureau of Permitting

WEL/fmhj
cc: Corps of Engineers
Board of Trustees